

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OTIS MYLES, JR.,

Defendant-Appellant.

UNPUBLISHED

June 27, 2006

No. 260806

Wayne Circuit Court

LC No. 04-008388-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OTIS MYLES, JR.,

Defendant-Appellant.

No. 260809

Wayne Circuit Court

LC No. 04-003822-01

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right his bench trial convictions for second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a), and first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b). Defendant was sentenced to 38 months to 15 years for the CSC II conviction and 135 months to 30 years for the CSC I conviction. The two cases were consolidated for appeal and we affirm defendant's convictions and sentences.

Defendant's convictions arose out of the alleged sexual abuse of the daughter and niece of defendant's live-in girlfriend. Defendant and his girlfriend resided in a house on Kellogg Street in the City of Detroit during the time frame these acts are alleged to have occurred. During the time period in which defendant resided with his girlfriend, he is alleged to have engaged in sexual acts with his girlfriend's daughter, who reported the incidents to adults but later recanted out of fear of reprisal from defendant. Each time defendant sexually assaulted either of the minors he reportedly told them not to tell anyone. Right after defendant allegedly committed a sexual assault on his girlfriend's niece; her daughter came into the room and

inquired what had happened. When the niece responded that defendant had “touched her,” the daughter stated “he touches me too.”

Defendant was charged with one count of first-degree criminal sexual conduct for assaulting the niece, who was thirteen at the time of the alleged incidents, and with two counts of first-degree sexual conduct (CSC) against the daughter, who was five years old. Following a bench trial, the trial court found defendant guilty of CSC I for the sexual assault on the niece and not guilty of two counts of CSC I but guilty of one count of CSC II for the sexual assault on the daughter.

Defendant first argues that he received ineffective assistance of counsel. The issue of ineffective assistance of counsel must be raised in a motion for a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Where a defendant fails to move in the trial court for a new trial or an evidentiary hearing with regard to the ineffective assistance claim, appellate review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 95 (2002). Here, since there was not a *Ginther* hearing in the trial court, this Court’s review is limited to the existing record. *Id.*, *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

A constitutional claim of ineffective assistance of counsel is reviewed under the standard established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), which requires the defendant to show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). The right to counsel under the Michigan Constitution does not impose a more restrictive standard than that established in *Strickland*. *People v Pickens*, 446 Mich 298, 318-319; 521 NW2d 797 (1994).

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The defendant bears a “heavy burden” on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *Garza, supra* at 255.

Defendant contends that trial counsel was ineffective when he failed to investigate and present witnesses who would have supported defendant’s alibi that he resided at a church mission, where he was not allowed to leave, after he no longer resided at the house on Kellogg, and that he therefore could not have sexually assaulted the 13-year-old victim. Defendant contends that such witnesses would also have testified that the five-year-old previously denied that defendant had abused her.

Defendant's arguments lack merit due to the fact that defendant's alleged alibi would not have proven that he did not assault the older victim. That victim alleged that the abuse occurred in May or June 2003, and defendant himself testified that he left the home on Kellogg on or about May 23, 2003. Trial counsel cannot be faulted for failing to present testimony that would not have exonerated defendant. See *Garza, supra* at 255.

Regarding the younger victim's previous statements that defendant had not assaulted her, the prosecution did not deny that this victim made such statements, and the victim never denied making them. Thus, testimony indicating that she had previously denied being assaulted by defendant would have been, at most, cumulative. Trial counsel cannot be faulted for failing to present testimony that would have been cumulative. *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003) (erroneous admission of evidence that was cumulative did not constitute ineffective assistance of counsel). Given the statements of the victims in this case coupled with the fact that the thirteen-year-old had contracted a sexually transmitted disease, there is no reasonable probability that but for the failure to present the testimony of the witnesses cited by defendant, the outcome of the trial would have been different. *Garza, supra* at 255.

Defendant next argues that the prosecution's failure to have defendant tested for a sexually transmitted disease as ordered by the trial court, constituted prosecutorial misconduct that violated defendant's due process rights to a fair trial and the production of exculpatory evidence. "Generally, a claim of prosecutorial misconduct is a constitutional claim reviewed de novo." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

"Claims of prosecutorial misconduct are reviewed case by case." *People v Walker*, 265 Mich App 530, 542; 697 NW2d 159, lv gtd 472 Mich 928, App held in abeyance 705 NW2d 687 (2005). "Generally, prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal quotation marks and citation omitted). A prosecutor's role is to seek justice, and not merely to obtain a conviction. *People v Pfaffle*, 246 Mich App 282, 291; 632 NW2d 162 (2001).

The trial court's order required that defendant's blood and urine be "tested for the presence of the disease trichomoniasis whether active or in the past" The prosecution failed to test defendant for Trichomoniasis. Upon the representation of the prosecution's appellate counsel, the reason for this failure is because the prosecution learned that city and county health care facilities would not test defendant for Trichomoniasis. According to the prosecution, "[t]he matter was brought before the [trial] court at a hearing, and the court relieved the police and the prosecutor of their obligation to comply with the court's prior order." The prosecution argues that defendant's failure to produce the transcript of this hearing waives appellate review of this issue. It is necessary to have such transcript in order to properly evaluate defendant's claim. However, because a court speaks through its written orders, *Rinas v Mercer*, 259 Mich App 63, 71; 672 NW2d 542 (2003), and no written order rescinded the trial court's order requiring that defendant be tested, defendant's failure to produce the transcript does not waive appellate review of this issue.

The question, then, is whether the failure to test for Trichomoniasis was outcome determinative. Defendant does not present evidence or even argue that the results of the test would have been negative. Therefore, it cannot be concluded that the results of the test would

have produced exculpatory evidence that would have changed the result of the trial. As such, defendant's claim of prosecutorial misconduct must fail.

Finally, defendant argues that his convictions were against the great weight of the evidence. "This Court reviews for an abuse of discretion the trial court's denial of a motion for a new trial on the ground that the verdict is against the great weight of the evidence." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Here, no motion for a new trial was made. We agree with the prosecution that the same abuse of discretion standard should apply in this case when this argument is made for the first time on appeal given that defendant's convictions resulted from a bench trial. An abuse of discretion exists if an unprejudiced person would find no justification for the court's ruling. *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004).

"The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *McCray, supra* at 637. A motion for a new trial does not authorize a court to assess witnesses' credibility, and conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); *McCray, supra* at 638. This Court will not substitute its judgment for that of the trier of fact, and will grant a new trial only if the evidence cannot support a finding of guilt beyond a reasonable doubt. *People v Jackson*, 171 Mich App 191, 199; 429 NW2d 849 (1988).

Here, the evidence does not preponderate against the verdict. The testimony of the victims strongly indicated that defendant sexually assaulted them. The five-year-old victim testified:

Q. And what happened when he was near you on the bed? Did he do something?

A. He touched me.

Q. Who touched you?

A. Otis.

Q. Where did he touch you?

A. In my private part.

The victim testified that her clothes were not on at that time because defendant had taken them off. She also testified that defendant put his "private part" inside her "private part."

The five-year-old victim testified to similar abuse on a second occasion. She was in the same room and defendant touched her with his "private part," which went inside her "private part."

Regarding a third incident, the victim testified:

Q. And what happened when your mom took your brother to Boy Scouts?

A. He touched me.

Q. Where did he touch you?

A. On my private part[.]

Q. What did he touch you with then?

A. His private part.

The 13-year-old victim also testified regarding abuse at the hands of defendant. She testified that as she sat on the bed, defendant placed his hand on her vagina over her clothes. She reflexively closed her legs. Defendant then “snatched his hand back.” Thereafter, “[h]e yanked back his hand, and then he reached down and he started trying to pull down my shorts, and I was hitting his hand. And then he yanked real hard and my shorts and underwear came down.” Defendant pulled the victim’s shorts and underwear to her ankles while she remained sitting down. “Then he unzipped his pants,” and “pulled out his private area.” “Then he got on top of me.” She further testified that defendant was able to push part of his penis inside her vagina.

The victims’ prior reports of the abuse were consistent with their trial testimony. The younger victim testified that after the third incident, she told her aunt about the abuse. The victim’s father testified that the aunt told him about the allegation of abuse in February 2002. The father talked to the victim at the house on Kellogg. The victim “appeared nervous and kind of scared.”

The older victim also reported the abuse. Immediately after the assault, she ran downstairs and hid in the corner. When the younger victim and her brother walked into the room and asked the older victim what was wrong, the older victim said, “Uncle Otis touched me.” The younger victim replied, “he touched me too.” Defendant told the older victim “don’t tell nobody.” This made her scared that if she told someone defendant might hurt someone in her family.

Later, the 13-year-old victim reported the assault to someone at a shelter. When it was discovered that she had contracted Trichomoniasis, a sexually transmitted disease, she gave defendant’s name as the person who had touched her.

The testimony of the victims, and the evidence indicating how they had identified defendant as the perpetrator, lent ample, specific support to the verdict. Accordingly, the verdict was not against the great weight of the evidence.

Affirmed.

/s/ Jessica R. Cooper

/s/ Janet T. Neff

/s/ Stephen L. Borrello